**PONNIAH KANTHASAMY**

**v.**

**TEH SAY HUA & ANOR.**

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CIVIL SUIT NO. 10 OF 1982]
29 SEPTEMBER 1988

***TORT:*** *Negligence - Injuries sustained in an accident - In the course of employment - Liability - Evidence of the defence - Duty of care - Quantum of damages.*

The plaintiff was working on top of a telephone pole at the material time and he was thrown off the ladder when the 1st defendant (who was the agent and servant of the 2nd defendant), after driving his tractor past him with its shovel upright entangled with the aerial cable lying across the shovel's path causing the aerial cable which was connected to a series of telephone poles to stretch and being down 6 telephone poles and to violently shake the pole on which the plaintiff was working, causing him to fall and suffer injuries.

The 1st defendant adduced evidence that the aerial cable was already sagging well below its normal height of 18 feet and the shovel of his tractor was in its folded position reaching a height of only 11½ feet. The defendants also argued that the 3rd party should have provided a safer system for the job in those circumstances. The issue was whether the 1st and 2nd defendants were liable, and the quantum of damages to be assessed.

**Held:**

**[1]** There had been no abnormal sagging of the aerial cable on that day and the Court was prepared to accept the corroborated evidence by the plaintiff's witness who stated that he had received a complaint on the previous day that a telephone in the area was not working but had not received any complaint that there had been any sagging of the aerial cable along that road. Further, the 1st defendant's police report was significantly silent on the fact of sagging.

**[2]** The 1st defendant's driving of the tractor with its shovel upright was the direct cause of the accident. The 1st defendant owed a duty of care to the plaintiff whilst traversing the road and entering the junction and in not putting the shovel in its folded position he was obviously in breach of his duty of care to the plaintiff and the question of foreseeability or remoteness does not apply.

**[3]** The plaintiff had observed the regulations prescribed by his occupational handbook in the use of the safety belt and the precautions he had to take. There was no other safer system which could have been devised for the job in the circumstances. Therefore the 3rd party cannot be held liable.

**[4]** The 1st defendant's negligence was the sole cause of the accident and both the defendants were liable.

**[5]** Damages awarded are as follows:

(i) General damages for pain and suffering and loss of amenities RM62,000 with 8% interest p.a. from the date of service of the writ.

(ii) Damages for loss of earning capacity. RM6,000 with no interest.

(iii) Estimated cost of surgical operation for posterior spinal fusion: RM10,000 with no interest.

(iv) Agreed special damages: RM1,119 with interest at 4% p.a. from the date of accident.

*[Judgment for plaintiff with costs.]*

*For the plaintiff - Reginald Vallipuram; M/s. Reginald Vallipuram & Co.*
*For the defendants - M. Gana; M/s. Goh & Associates*
*For the 3rd Party - Hassan Ibrahim; M/s. Hassan Ibrahim & Co.*

**JUDGMENT**

**LC Vohrah J:**

The plaintiff's claim is for damages for personal injuries arising out of the alleged negligence of the first defendant as a servant/agent of the second defendant whilst driving tractor JAE 1383 at about noon on 14 December 1980.

Briefly the case for the plaintiff as adduced by the evidence of the plaintiff and his witnesses is that he in the course of his employment whilst working on top of a telephone pole was thrown off the ladder he was standing on when the first defendant after driving his tractor past him with its shovel upright entered the junction (represented by the letters CD in the Sketch-plan AD15) whereupon the upright shovel became entangled with the aerial cable lying across the shovel's path causing the aerial cable which was connected to a series of telephone poles to stretch and bring down six telephone poles and to violently shake the pole on which the plaintiff was working resulting in the distributor tail cable snapping entwining his right leg and causing him to fall on to the ground.

The evidence for the defence in a nutshell as adduced by the first defendant was that the aerial cable was already sagging well below its normal height of 18 feet and as the tractor was being driven into the junction with its shovel in its folded position reaching a height of only about 11½ ft., the shovel became entangled with the sagging aerial cable resulting in the aerial cable which was connected to several poles being pulled with great force causing the aerial cable and the poles to fall down.

After considering all the evidence in this case I had no reason whatsoever to doubt the evidence of the plaintiff that there had been no abnormal sagging of the aerial cable on that day. This evidence is corroborated by the evidence of the technician PW2 who received the complaint from Tractor Malaysia the previous day to the effect that its telephone was not working but he had not received any complaint from his workers, members of the public, or from the ICT factory that there had been any sagging of the aerial cable along that road. Accordingly I have good reason to believe that the aerial cable was at its normal height of about 18 feet from the ground. In this regard I find it hard to accept the first defendant's evidence that it must have been below the normal height of 11 ft. of the folded shovel of his tractor. In any event if the sagging of the aerial cable and its consequent reduced height had been the cause of the accident surely that fact would have been reflected in his police report D1 which is significantly silent on this score.

I have no reason also to doubt the evidence of PW3 and PW4, fellow workers of the plaintiff at the scene, that they had seen the tractor pass them by with its shovel in its upright position. I am more than satisfied that the tractor driven by the first defendant did pass the plaintiff's worksite with its rear shovel in an upright position shortly before the plaintiff was thrown off his ladder. From the evidence of the first defendant himself I am satisfied that it was his tractor shovel which pulled the aerial cable with such great force that it caused the

poles to which it was connected across the whole length of the road from the point C to the point Z in AD15 to collapse. This, in my view, is clear evidence that the first defendant's driving of the tractor with its shovel upright was the direct cause of the accident. I do not accept the first defendant's evidence that he had not seen any activity on the road when the tractor turned into the junction because AD15 does not show any side road anywhere near the junction and the police sergeant PW6 was never cross-examined as to its location so that the side-road from which he came out must have been beyond the work-site and the first defendant must have had to pass the plaintiff and his colleagues whilst proceeding to the ICT factory. He certainly, in my view, owed a duty of care to the plaintiff whilst traversing the road and entering the junction and in not putting the shovel in its folded position he was obviously in breach of his duty of care to the plaintiff and the question of foreseeability or remoteness does not apply.

Having regard to the plaintiff's evidence and that of PW4 I am satisfied that the plaintiff observed the regulations prescribed by his occupational handbook in the use of the safety belt and the precautions he had to take and I do not see in the circumstances what other or safer system could have been devised for the job. Accordingly I do not think the third-party can in any way be said to be negligent by failing to provide a safe system of work. In the event I find the first defendant's negligence to be the sole cause of the accident and find both the defendants liable.

Having regard to the injuries sustained by the plaintiff as described in the medical reports AD1-7 and to the authorities that have been cited, I award damages as follows.

1) **General Damages for pain and suffering and loss of amenities:**

For the abrasion and compression fracture of the 1st lumbar vertebra with the following resultant neurological complications:

a) loss of anal and urethral sphincteric control:

b) saddle anaesthesia;

c) loss of sexual activities;

d) cock-up of his left toes at the interphalangeal joint level;

e) decrease sensation over the L5 and S1 dermatomes;

f) brisk knee jerks and absent ankle jerks; and

g) spondylolysis at L5 level

= RM62,000 @ 8% interest p.a. from the date of service of the writ.

2) **Damages for Loss of Earning Capacity:**

RM6,000 with no interest

3) Estimated cost of surgical operation for posterior spinal fusion:

= RM10,000 with no interest.

4) Agreed special damages:

RM1,119 with interest at 4% p.a. from the date of the accident.

I am not making any award for post-retirement loss because after the age of 55 the plaintiff should not be expected to climb up long ladders or poles. I have no reason to believe that he will not be able to do the sort of job he is doing now if he feels so inclined after retirement and he should arrange his finances in such a way after the award in this case to set himself up in an occupation befitting his physical condition.

The plaintiff is entitled to his costs which shall be taxed unless the amount is agreed upon.

The third-party is also entitled to its costs which shall be taxed unless the amount is agreed upon.

Also found at [1989] 2 CLJ 212